

No. 43262-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

EDWARD J. CRABLE,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

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The Honorable Brian Tollefson, Judge (trial)

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*OPENING BRIEF OF APPELLANT*

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A. ASSIGNMENT OF ERROR

The prosecutor committed flagrant, prejudicial and ill-intentioned misconduct and there is a substantial likelihood the misconduct affected the verdict.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the prosecutor commit misconduct and should reversal and remand for a new trial be ordered when the prosecutor told the jury in closing argument that appellant had essentially violated the social contract by committing the crime and that it was a “slap” in the face of the judicial system?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Edward J. Crable was charged by information with one count of violating a domestic violence court order with increased classification and an aggravating factor that “the defendant committed the current offense shortly after being released from incarceration.” CP 1; RCW 9.94A.535(3)(f); RCW 26.50.110(5); RCW 26.52.020. After a bail hearing before the Honorable D. Gary Steiner on October 27, 2011, and continuances before the Honorable Katherine Stolz on January 4 and 9, 2012, a jury trial was held before the Honorable Brian Tollefson on January 23 and 25, February 13, 14, 15 and 16, 2012.<sup>1</sup> The jury found Mr. Crable guilty as charged and, on March 2, 2012, Judge Tollefson imposed an exceptional sentence above the standard range of 42 months. CP 30-

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<sup>1</sup>The verbatim report of proceedings consists of five volumes, which will be referred to as follows:

the volume with the proceedings of October 27, 2011, as “1RP;”

the volume with January 4 and 9, 2012, as “2RP;”

the two chronologically paginated volumes containing the proceedings of January 23, 24 and 25, February 13, 14, 15, the morning of February 16 and the sentencing on March 2, 2012, as “RP;”

the verdict on February 16, 2012, as “3RP.”

32, 74-92.

Crable appealed, and this pleading follows. See CP 93-111.

2. Testimony at trial

Pierce County Sheriff's Department investigator Robert Shaw testified that, on October 21, 2011, he came into contact with Edward Crable during a "traffic stop." RP 100-101. The stop was part of an investigation by Shaw and some other officers, who had been given information that Crable had been "issued a restraining order in court earlier that day." RP 103. Shaw described the order as saying "you can be arrested even if any person protected by this order invites or allows you to violate the order's provisions." RP 103. The "protected party" for the restraining order was Bridget Ann Warren. RP 103-104.

The officers waited and watched Crable leave jail that day. RP 102. Todd Karr, one of the officers involved, testified that the officers wanted to see where Crable went and "who he came into contact with" after leaving the jail. RP 143. Crable walked through the "County-City Building campus, then walked up to a doorway at a bail bondsman across the street, where he pulled on a door and knocked on a window. RP 102. Shaw testified that, when Crable got no response, Crable moved away down the street and walked to another bail bondsman nearby. RP 102. Karr thought that Crable went into that business for a short time. RP 148.

After a few minutes, Crable left that bondsman's office and went to a nearby McDonald's restaurant parking lot. RP 102, 148. Crable then got into a car which was parked next to a car in which two officers sat. RP 102. Karr said Crable hugged the woman who was behind the steering

wheel of the car he got into and petted “a couple of dogs” inside. RP 148. Shaw testified that the officers had a driver’s license photo of Bridget Warren and the officers in the nearby car notified Shaw that “they believed it was her in the vehicle.” RP 105.

Shaw went to park on Tacoma Avenue and, when the car in which Crable was riding went by, Shaw was able to see inside and thought the person who was driving appeared to be the woman in the driver’s license photo. RP 105-106. Shaw pulled his car behind the other car and searched the license plate on his in-car computer. RP 106. The car was registered to Warren. RP 106.

Shaw activated his emergency lights and siren and stopped the other car. RP 106. At Shaw’s request, the woman driving the car gave the officer a driver’s license which identified the woman as Warren. RP 106-107. The address on the license was the same as the address on the license Crable gave the officer when asked. RP 107.

Crable was arrested. RP 110. Karr did not arrest Warren, however, because he was not sure if the order applied to her, too. RP 153.

According to Shaw, at some point during the contact or possible on the ride back to jail, Crable said that Warren was the only person he knew in the state, that he was just trying to get a ride home from jail and that he “just wanted to go get his things and get a shower.” RP 110. Crable also asked to be let go and promised that, if officers released him, he would have no further contact with Warren. RP 110-11.

Karr transported Warren back to jail and said that Crable made several “spontaneous comments” on the short drive. RP 154. Karr

testified that Crable mentioned that he was trying to get home to get his clothing and take a shower, and that he had told Warren he “couldn’t stay there.” RP 155.

Kara Sanchez, a prosecutor at the Pierce County Prosecutor’s Office, testified that, on October 21, she was in court in a prosecution involving Mr. Crable. RP 158-61. Crable was being prosecuted for violating a no contact order on June 28 and July 1, 2011, and had entered pleas and been sentenced that day as a result. RP 158-63. Sanchez said that, as part of the judgment and sentence in that case, there was an order “prohibiting contact as a condition of sentence.” RP 161.

Prior to that day, Sanchez had spoken with Warren regarding the case. RP 164. Warren had to work and was not going to be able to be present for sentencing. RP 164. The prosecutor admitted telling Warren that, if Warren had “anything that she wanted the judge to know she could put it in a letter and get it to” Sanchez, who would “hand it forward” to the judge at the sentencing. RP 164.

Sanchez admitted that Warren did not want a “no contact” order to be issued or in place. RP 164. The prosecutor thought that the letter Warren had faxed over to the prosecutor had asked that the order be amended to “no hostile contact,” rather than prohibiting all contact at all. RP 165. Sanchez said that she gave Warren’s letter to the judge as promised. RP 164.

Nevertheless, the judge had imposed a no contact order for Warren at sentencing, stating that Warren could come back before the court after there had been some evaluations done of Crable, and the court would then

“entertain a motion to modify the no contact order” because at that point the judge would be able to “make an informed decision.” RP 166-67. The judge did not want to “jump in at this point” and change the no contact order without the information. RP 166-67.

Sanchez read some of the sentencing transcript into the record of the current case, including the court telling Crable:

It is very important that you follow the no contact order. I know you don't want to. I know she doesn't want to. You have two convictions now for violations of a no contact order. Even if she wants to have contact with you, you can't have any contact with her. If you are caught with her she doesn't go to jail, you go to jail. It is very important to do this.

That is another thing I look at when somebody comes before me and asks to have the no-contact order modified, has the Court's previous order been followed. Have you had respect for this Court's order. I don't want to break up families, I don't want to break up support systems, but I want to be comfortable in the decision that I make.

RP 166-67. Sanchez expressed her opinion that Crable did not indicate any confusion about the court's declarations at sentencing. RP 167-68. Sanchez also said she had personally served Crable with the order right there in court. RP 167-68.

At the end of the hearing, Sanchez said, the judge had said that Crable “ought to be able to make a phone call and have someone come pick him up” but again reminded Crable that he “[c]an't be having any contact with Ms. Warren.” RP 168.

Bridget Warren testified that she was aware of the no contact order and that Crable was going to enter pleas. RP 175. Warren got a phone call from Sanchez, who had explained about the plea bargain, and they had talked for “quite a while.” RP 176. Sanchez had asked Warren if she had



any concerns and Warren had told her that she was the only family or person Crable knew in the area. RP 176. Warren also told Sanchez that she wanted to have the no contact order removed or have it “reduced” to a no hostile contact order. RP 177.

Warren said she wrote several letters on Crable’s behalf and was in disbelief” at the severity of the charges Crable had faced, because she thought that Crable needed “rehab” and mental health treatment for “posttraumatic stress disorder,” not jail. RP 177. Warren agreed, however, that she had called police in June, which had led to the original charges. RP 197. She had said in her statement that day that he had been drinking, they were fighting, and he was threatening to kill himself. RP 201.

On the day she picked Crable up in the car, Warren said, she had called the prosecutor’s office and found out that Crable was going to be released sometime between 4 and 10 that day. RP 179. When Warren did not get a phone call from anyone saying it had happened, she packed up her two little poodles, put them in the car and drove to the McDonald’s near the courthouse, close to the jail. RP 179. She testified that it was around 7:30 when she did that and that she figured Crable would just find her there. RP 179.

Warren also testified that someone named “Jeremy” who lived in California had also called to tell her that Crable was being released that evening. RP 203. Warren had talked to Jeremy, who was Crable’s friend, several times that day and she was on the phone with him in the McDonald’s parking lot, too. RP 206. Indeed, Warren said, she had

known Jeremy for as long as she had known Crable - about ten years. RP 209. Warren said Jeremy was Crable's best friend, and that, when "all this happened," "of course" she called Jeremy. RP 209.

Shaw admitted that, when he spoke with Warren after Crable's arrest, Warren told the officer that a friend in California had called her and told her when Crable was supposed to be released. RP 111.

According to Warren, when she first saw Crable in the McDonald's parking lot that day, he was "standoffish." RP 179, 207. Warren then rolled down her window and said, "it's okay," and "I faxed a letter to Kara [Sanchez] and I had the no contact order dropped to a no hostile order." RP 179, 207. She told him to get in the car and they drove away. RP 207.

Sanchez conceded that, after talking with Warren and having Warren fax over her request for a "no hostile contact" order, the prosecutor never contacted Warren to tell her that request had been denied. RP 170.

After Crable's arrest, Warren said, she told the officers about the no contact order being lifted. RP 205-206. Shaw admitted that, when he spoke to Warren, she said she had sent a letter regarding the restraining order to "an attorney." RP 111. Warren also said she had told police "the order is lifted, the order is lifted." RP 206. She acknowledged that Shaw had not included those statements in his police report for that day. RP 206-207.

D. ARGUMENT

THE PROSECUTOR COMMITTED MISCONDUCT AND  
THERE IS A SUBSTANTIAL LIKELIHOOD THE  
MISCONDUCT AFFECTED THE VERDICT

Unlike other attorneys, prosecutor's enjoy a special status as "quasi-judicial officers." See State v. Huson, 73 Wn.2d 660, 664, 440 P.2d 192 (1968), cert. denied sub nom Washington v. Huson, 393 U.S. 1096 (1969). As a result, they are tasked with seeking justice, rather than seeking to "win" a conviction at all costs. See State v. Rivers, 96 Wn. App. 672, 675, 981 P.2d 16 (1999). Further, as the Supreme Court has recently noted, the prosecutor's duties require seeking convictions based solely upon the evidence, rather than emotion or other improper grounds. See State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011). When the prosecutor fails in these duties and commits misconduct, it can violate the defendant's rights to a fair trial. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

In this case, the prosecutor failed in her duties by committing serious, prejudicial misconduct. Further, because there is a substantial likelihood the misconduct affected the verdict, reversal and remand for a new, fair trial is required.

a. Relevant facts

In closing argument, the prosecutor began by telling jurors that, in Washington and "all over America crimes are to be zealously prosecuted when the facts are there supporting the law, that the - - the violation of law that has occurred." RP 252.

She then went on:

This case is important because when the State of Washington through its superior courts issue orders under which they have jurisdiction to parties, including Mr. Crable, those orders have meaning. We all have rules that we have to abide by every day. It's part of the social contract we enter into living in a society. And whether he likes it, whether Mr. Warren likes it, the rules were clear as they applied to Mr. Crable.

As of October 21<sup>st</sup>, 2011[,] he was under no circumstances to have any contact with Ms. Warren. That's what this case is about. That does in fact mean something.

RP 253. Counsel objected, "[t]his has nothing to do with the evidence in this case" and "[a]sking the jurors to put themselves in the shoes of the defendant." RP 253. The court overruled the objection. RP 253.

A few minutes later, the prosecutor returned to this theme, saying that the fact that the crime had occurred "upon recently being released from incarceration" was important. RP 260. The following exchange then occurred:

[PROSECUTOR]: And the State submits that's why this case, while not groundbreaking, earth shattering, it means something. You can't walk out of a sentencing and that very same day blatantly violate a court order. It's a slap in the face to the judicial system.

[COUNSEL]: Your Honor, I'm going to object to that statement. Counsel is trying to put her prestige behind its arguments. You're supposed to just be - -

THE COURT: Objection sustained.

RP 260.

- b. The arguments were misconduct which compels reversal

The prosecutor committed prejudicial misconduct in making these arguments. It is improper and misconduct for a prosecutor to effectively

tell the jury that they should “send a message” by their verdict, because that amounts to telling the jury to decide the case on an improper basis. See State v. Powell, 62 Wn. App. 914, 918-19, 816 P.3d 86 (1991), review denied, 118 Wn.2d 1013 (1992). Further, such arguments carry the risk they will “divert the jury’s attention from its true role of deciding whether the state has met its burden of proving the defendant guilty beyond a reasonable doubt.” See State v. Montjoy, 366 N.W.2d 103, 109 (Minn. 1985). In addition, such arguments act to “promote a sense of partisanship with the jury that is incompatible with the jury’s function” of deciding the case on the evidence, rather than improper emotion. See State v. Neal, 361 N.J. Super. 522, 537, 826 A.2d 723 (2003).

Here, the prosecutor engaged in just such misconduct with her theme of implying that the jury should send a message with its verdict.. First, the prosecutor exhorted the jury that “orders have meanings,” that complying with them was “part of the social contract” and that orders do “in fact mean something.” RP 253. Then, the prosecutor returned to this theme, declaring that the case against Crable “means something,” and telling the jury, “[y]ou can’t walk out of a sentencing and that very same day blatantly violate a court order. It’s a slap in the face to the judicial system.” RP 260. The clear purpose of these arguments was to incite the jury’s passions and prejudices and encourage them to convict Crable not based on the evidence but based upon the need to “send the message” and punish Crable for his purported disrespect for the system and breaking of the “social contract.”

Reversal is required. Where, as here, counsel objected below, the

question is not whether the misconduct was “so flagrant and ill-intentioned” that it could not have been cured by instruction. See, State v. Gonzalez, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003). Instead, the question is whether there is a “substantial likelihood” the misconduct could have in any way had an effect on the jury’s verdict. See State v. Barrow, 60 Wn. App. 869, 877, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991).

There is such a likelihood here. Despite the strength of the prosecution’s evidence, there was also conflicting evidence about what Crable knew and whether he thus “knowingly” violated the no contact order. The prosecutor’s misconduct urged the jury to find Crable guilty based upon a desire to vindicate the “social contract” and the system by convicting, regardless whether the jury believed that Crable did not know the no contact order was still in effect after Warren told him it was not. The misconduct here was likely to have had an effect on the jury’s ability to fairly and impartially decide the case based upon the evidence, rather than emotion or other improper grounds.

Because there is more than a substantial likelihood that the misconduct could have affected the verdict, reversal and remand for a new, fair trial is required. This Court should so hold.

E. CONCLUSION

Mr. Crable was entitled to a fair trial, untainted by the misconduct of the prosecution. Because he did not receive such a trial, reversal and remand for a new, fair trial is required.

DATED this 27th day of March, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel by e-filing through this Court's system this date, and by first-class mail, postage prepaid, to Mr. Edward Crable, DOC 353317, Airway Heights CC, P.O. Box 1899, Airway Heights, WA. 99001-1899.

DATED this 27th day of March, 2013.

/s/ Kathryn Russell Selk  
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